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# In the Supreme Court of the United States

HELEN MOORE, *et al*

Petitioner,

v

DETROIT SCHOOL REFORM BOARD, *et al*,

Respondents.

***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit***

## RESPONDENT GOVERNOR OF THE STATE OF MICHIGAN JOHN ENGLER'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

**JENNIFER M. GRANHOLM**
Attorney General of Michigan

Thomas L. Casey
Solicitor General of Michigan
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Katherine C. Galvin
Assistant Attorneys General

Attorneys for Respondent
Governor

## QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 USC § 1973 empower the Courts to review the Michigan Legislature's exercise of fundamental sovereign powers concerning the structure and governance of the state's public school system, specifically 1999 PA 10's replacement of elected school boards with appointed school boards in defined qualifying districts, when Michigan is not subject to Section 5 of the Voting Rights Act?

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## STATEMENT OF THE CASE

This case involves the validity of a Michigan statute, 1999 PA 10, which replaces elected school boards with appointed boards in qualifying school districts. A qualifying school district is one with a student population of more than 100,000. MCL 380.701, 380.402. Presently, only the Detroit School District has such a student population. App A to Plaintiffs' Petition at 2a, Sixth Circuit Court Opinion (June 12, 2002) (hereinafter "6th Cir Op"). Many people and organizations, including the majority of the Michigan Legislature, believed that the Detroit School District was a district in deep distress, with serious problems in governance, administration, management, finance and operation. *See* App A, 6th Cir Op, at 3a-5a. Detroit Public School students fared poorly on standardized tests and the school system suffered from a high dropout rate. *Id.* at 5a. The majority of the Legislature, and many others, believed that the elected school board had failed to effectively deal with the District's many problems. *Id.* at 3a-5a.

Plaintiffs, a number of Detroit residents and community organizations, filed suit in the United States District Court for the Eastern District of Michigan claiming 1) that 1999 PA 10 had been enacted in violation of various provisions of the Michigan Constitution of 1963, including the provisions governing the passage of local acts, art 4, § 29; 2) that, insofar as it provided for the replacement of an elected school board with an appointed board, 1999 PA 10 violated § 2 of the Voting Rights Act ("VRA"), 42 USC § 1973; and 3) that 1999 PA 10 violated various provisions of the United States Constitution, including the Fourteenth and Fifteenth Amendments. The defendants are the new School Reform Board of the City of Detroit; David Adamany, the person chosen by that Board to be the chief executive officer of the school district; then-Mayor of Detroit, Dennis Archer; and the Governor of the State of Michigan, John Engler.

The Defendants filed motions for summary judgment and the Plaintiffs filed a motion for partial summary judgment. On October 25, 2000 United States District Judge Nancy Edmunds issued an Opinion and Order denying the Plaintiffs' motion for summary judgment and granting the Defendants' motions for summary judgment. A judgment was entered that same day. Plaintiffs immediately filed a Notice of Appeal.

On June 12, 2002, the Court of Appeals for the Sixth Circuit affirmed the District Court decision dismissing this matter in its entirety. On August 9, 2002, the Court denied Plaintiffs' motion for rehearing. In this petition for writ of certiorari, Plaintiffs seek only a review of the lower court's dismissal of their VRA claim.

With respect to the VRA claim, the Sixth Circuit Court of Appeals held that the Plaintiffs' claim was foreclosed by *Mixon v Ohio,* 193 F 3d 389 (6th Cir 1999), that *Mixon* was correctly decided, and that that decision had not been undermined by this Court's decision in *Reno v Bossier Parish School Bd.*, 528 US 320, 145 L Ed 2d 845, 120 S Ct 866 (2000) (*Bossier Parish II*). Specifically, the Court applied *Mixon*'s holding that Section 2 of the VRA only governs elective offices and that appointed offices do not come within the purview of that section of the Act. As the legislative action challenged herein was the replacement of qualifying elected school boards, the Court below held that no Section 2 action exists.

## STATEMENT OF FACTS

At issue in this case is a Michigan statute, 1999 PA 10, which provides for the appointment of reform school boards in qualifying school districts. The reform boards, and the chief executive officer which they are required to appoint, take the place and assume the duties and responsibilities of the elected school boards in the qualifying districts. MCL 380.702, 380.703. A qualifying school district as defined by 1999 PA 10 is a school district of the first class. MCL 380.371. A school district of the first class, a classification that previously existed under the School Code, is a district having an enrollment of at least 100,000 students. MCL 380.402. At the time that 1999 PA 10 was enacted, and still today, there is only one school district that meets the definition of a qualifying district, the Detroit School District. App A, 6th Cir Op, at 2a.

1999 PA 10 was enacted in response to serious and persistent problems and shortcomings that had plagued the Detroit School District. Those problems were described in the opinion and order of the District Court. App E to Petition at 41a-47a, District Court Opinion and Order Denying Plaintiffs' Motion for Partial Summary Judgment; Granting Defendants Adamany's, School Reform Board's, and Archer's Motion for Summary Judgment; and Granting Defendant Governor Engler's Motion for Summary Judgment, pgs. 3-6 (R 84)) (hereinafter "D Ct Op"). The Detroit School District is by far the largest school district in the State of Michigan. App A, 6th Cir Op, at 2a. As a whole, the district suffered from high drop out rates and low achievement. Many people and organizations, including the majority of the Michigan Legislature, believed that the Detroit School District was a district in deep distress, with serious problems in governance, administration, management, finance and operation. *Id.* at 4a-5a. A study of the school district by the nonprofit New Detroit, Inc. had concluded in 1997 that there was "an immediate need for a fundamental restructuring of Detroit public Schools' organization and for dramatic changes in the way people do

their jobs at every level of the system." *Id.* at 3a-4a. Progress in implementing the recommendations made by New Detroit was glacial. *Id.* Additionally, while the voters of the school district had authorized a 1.5 billion dollar bond issue in 1994 to repair school buildings and construct new ones, no monies had actually been spent on those tasks by 1999. *Id.* at 5a. Faced with those circumstances, the Legislature enacted 1999 PA 10 in an attempt to improve conditions in the Detroit School District. *Id.* The Legislature relied in part on studies demonstrating that a change in the governing structure of a school system could lead to improvements in the performance of a school system. (Attachment B to Defendant Engler's Brief in Support of Motion for Summary Judgment (R 69), found at 6th Cir Joint Appendix, Vol 2, pp. 615-626). The Legislature also took note of what had been done legislatively to improve other large urban school districts, most particularly the Chicago school district. (*Id.*)

1999 PA 10 made certain changes to Michigan's Revised School Code, MCL 380.1 *et. seq.* The Act added a new part to the School Code--Part 5A: Appointment of School Reform Boards. Part 5A provides that the mayor of a school district in which a qualifying school district is located shall appoint a 7-member school reform board. MCL 380.372(2). For the first five years, one of those board members must be the state superintendent of public instruction or his designee. *Id.* Except for that person, the members of the school reform board serve at the will of the mayor. MCL 380.372(4). No one who was a current member of the elected school board could serve on the reform board. MCL 380.372(3).

A reform school board is required to appoint a chief executive officer of the school district. MCL 380.374. 1999 PA 10 originally required that the chief executive officer be a unanimous selection of the reform board. MCL 380.374. That provision was amended by 1999 PA 23 to eliminate the unanimity requirement, although the superintendent of public instruction or his designee still had to vote in favor of any selection.

The chief executive officer assumes all of the powers and duties of the elected school board of the school district. MCL 380.373(4). The former elected school board may voluntarily serve as an advisory body. MCL 380.373(1). After 5 years, the question of whether to retain the reform school board must be placed on the ballot. MCL 380.375.

## SUMMARY OF ARGUMENT

The establishment and organization of schools is a matter of great importance to State government. The ability to structure and govern the public school system, including the power to make policy decisions regarding the best way to respond to schools in crisis, is a fundamental component of the States' sovereign power and responsibility to serve and protect their citizenry. Plaintiffs submit that, even if a jurisdiction does not have a history of racially discriminatory voting practices sufficient to subject it to review under Section 5 of the VRA, Section 2 of the VRA empowers the courts to encroach upon these fundamental sovereign powers to review the legislative decision to shift from an elective to an appointive system. Plaintiffs' claim is contrary to the express language of Section 2, the legislative history of the Voting Rights Act, the consensus of the federal courts reviewing this issue, this Court's important dicta in *Chisom v Roemer*, 501 US 380, 404, 111 S Ct 2354, 115 L Ed 2d 348 (1991) and to basic principles of federalism, separation of powers and state sovereignty. Plaintiffs do not present an issue warranting this Court's review and Respondent Governor of the State of Michigan John Engler respectfully submits that this petition for writ of certiorari should be denied.

## ARGUMENT

**I. The Sixth Circuit Court of Appeals correctly held, in conformity with all of the federal courts that have addressed this issue, that a jurisdiction that is not subject to Section 5 of the VRA can replace an elective system for filling public office with an appointive system and that that sovereign decision is not subject to review under Section 2 of the VRA.**

A. In *Mixon, supra*, and the instant matter, the Sixth Circuit Court of Appeals correctly held that the language and legislative history of Section 2, as well as the important dicta statements by this Court in *Chisom v Roemer*, dictate finding that the decision to replace an elected school board with an appointed one is not subject to a Section 2 challenge.

Plaintiffs claim that 1999 PA 10 violates § 2 of the Voting Rights Act because it provides for an appointed reform school board and chief executive officer that exercise the powers of the previously elected school board. This claim is unsupported by the language of Section 2 and the legislative history of the VRA and conflicts with the unanimous determinations of all the federal courts that have addressed this issue. Most recently, in *Mixon, supra,* the Sixth Circuit Court of Appeals followed the unanimous view of the federal courts and held that "Section 2 of the Voting Rights Act does not apply to appointive offices." 193 F3d at 408. Significantly, in *Mixon* the Court held that a Section 2 action does not exist even where the challenged public offices had previously been filled through an elective process. *Id.*

In all relevant aspects, the Ohio statute at issue in *Mixon* was identical to the Michigan statute at issue here, 1999 PA 10. The Ohio statute, HB 269, provided for the appointment of school boards in "municipal school districts." *Mixon,* at 395. The only school district that met the definition

of "municipal school district" was the school district that included the City of Cleveland and several of its suburbs. *Id.* at 409. The appointed school board replaced a previously elected school board. *Id.* at 394. H.B. 269 provided that after a period of time an election would be held at which the school district voters would decide whether to continue the appointed board or return to an elected school board. *Id.* at 396.

The Michigan statute at issue here likewise provides for the appointment of school boards in "qualifying school districts." At present the only school district that falls within the definition of "qualifying school district" is the school district of the City of Detroit. An appointed school board, and the chief operating officer it selects, would replace a previously elected board. After five years an election will be held at which the voters of the Detroit School District will decide whether to retain the appointed board or return to an elected school board.

In rejecting the Section 2 challenge in *Mixon*, the Sixth Circuit Court of Appeals relied on the unambiguous language of Section 2. *Mixon, supra,* at 406-408. Section 2 of the VRA provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 173b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally

> open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

As the Sixth Circuit Court of Appeals properly recognized, the plain language of this section refers only to **election** and **nomination**, terms that have no applicability to **appointive** offices. *Mixon,* 193 F 3d at 407. Additionally, Section 2 refers to **representatives.** In *Chisom v Roemer,* 501 US 380, 399-400, 111 S Ct 2354, 115 L Ed2d 348 (1991), this Court defined "representatives" for purposes of determining the scope of Section 2 as meaning the winners of popular elections. Appointed officers do not come within this definition of "representatives."

No doubt it is this unequivocal language of Section 2 that led this Court to state in *Chisom*, after concluding that the Voting Rights Act applied to the election of judges in Louisiana, that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed . . . ." 501 US at 401. Thus, *Chisom* makes clear that the very action challenged herein, the sovereign decision to shift from an elective to an appointive system, is outside the reach of a Section 2 challenge.

Further support for the conclusion that Section 2 does not provide a basis for challenging a sovereign's decision to replace an elective system for filling public office with an

appointive system is found in the legislative history of the VRA. As the *Mixon* Court held, the legislative history of the VRA does not support the existence of a Section 2 action to challenge a shift from an elective system to an appointive system. 193 F 3d at 407-08. Specifically, in *Mixon* the Court found that "[d]espite some cursory language in the legislative history, there is no strong evidence that Congress intended Section 2 to provide a basis for challenging appointive systems." *Id.* (citing S Rep 97-417, at 6 (1982), reprinted in 1982 USCCAN 177, 183 (discussing, among other things, shifts from elective to appointive office.)).

Moreover, in *Mixon* the Court properly recognized that it is significant that Congress did provide for limited review of decisions replacing an elective system with an appointive system when made by certain jurisdictions (i.e., jurisdictions subject to Section 5), but did not explicitly provide for general review of such decisions by all jurisdictions. Section 5 of the VRA dictates that certain jurisdictions must have any changes to election practices or procedures reviewed by the Department of Justice or the Federal District Court for the District of Columbia before they are allowed to go into effect. 42 USC § 1973c; *Mixon,* 193 F 3d at 407. Section 5 review (i.e., "preclearance") examines whether the proposed changes would cause a retrogression of protected minority voting rights and is required only of jurisdictions with a history of voting discrimination. 42 USC 1973c; *Mixon,* 193 F 3d at 407.[1] Thus, the *Mixon* Court concluded:

> **The fact that Section 5 is limited to certain jurisdictions implies that Congress intended to allow other jurisdictions to change from an elective to an appointive system without facing challenges under the Voting Rights Act.** In the absence of contrary congressional intent, we find these reasons sufficient to

[1] The State of Michigan does not have a history of discriminatory voting practices and is not subject to Section 5.

> exclude cases like this one from the purview of the Voting Rights Act. [*Id.* at 408 (emphasis added)]

Finally, in *Mixon* the Court observed that all federal courts that had addressed the issue had determined that § 2 only applied to elective systems and not to appointive systems. *Mixon,* 193 F3d at 407.[2] That is still the case. There is no contrary precedent. Because *Mixon* was properly decided and is on all fours with the instant matter, the lower courts properly applied that decision and dismissed Plaintiffs' VRA claim. Plaintiffs do not present this Court with an issue warranting its review and the petition for writ of certiorari should be denied.

B. Arguments by amici below attempting to distinguish *Mixon* from the instant matter are without merit and should be disregarded if presented to this Court.

The briefs of the amici below make various attempts to distinguish this case from the one facing the *Mixon* Court. These arguments, however, fail to point out any legally significant difference. Because one amicus has already sought a stipulation to file a brief in support of the petition in this Court, the undersigned proffers the following response for the Court's consideration.

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[2] Citing *African-American Citizens for Change v St Louis Bd of Police Comm'rs,* 24 F 3d 1052, 1053 (8th Cir 1994); *Irby v Virginia State Bd,* 889 F 2d 1352, 1357 (4th Cir 1989); *Dillard v Crenshaw County,* 831 F 2d 246, 251 (11th Cir 1987); *Searcy v Williams,* 656 F 2d 1003, 1010 (5th Cir 1981), *aff'd Hightower v Searcy,* 455 US 984, 102 S Ct 1605, 71 L Ed 2d 844 (1982); *African-American Legal Defense Fund, Inc v New York,* 8 F Supp 2d 330, 339 n 14 (SDNY 1998); *African-American Voting Rights Legal Defense Fund, Inc, v Missouri,* 994 F Supp 1105, 1122 (ED Mo 1997), *aff'd per curiam* 133 F 3d 921 (8th Cir 1998); *Prewitt v Moore,* 840 F Supp 436, 440 (ND Miss 1993); *Williams v State Bd of Elections,* 696 F Supp 1563, 1568-69 (ND Ill 1988) (parentheticals omitted).

The brief filed on behalf of the American Civil Liberties Union Fund of Michigan and the Center for Constitutional Rights (The ACLU brief) attempts to distinguish *Mixon* by arguing that Michigan, unlike Ohio, has not adopted a true appointive system for the governance of the school system of the City of Detroit. That argument is based on a claim that the elected school board remains in place, albeit in an advisory role only.

The fact that the elected board may still have some sort of advisory role is irrelevant. The basic statutory function of the elected school board was to direct the operation of the school district. That basic statutory function has now been placed in the hands of an appointed board and the chief executive officer whom it appoints in turn. The system has been changed from an elective system to an appointive system. The holding of the *Mixon* court applies--§ 2 of the Voting Rights Act has no applicability to a change from an elective system to an appointive system.

The elected board has no power or authority after the adoption of 1999 PA 10. MCL 380.373. It is entitled to no compensation, reimbursement, funds or staff. *Id.* It is effectively a nullity. The operation of the school district has been completely committed to the appointed board. Even if the voters eventually decide to return to an elected system, the old elected board does not simply resume its duties. A new school board would be elected. MCL 380.375. The Michigan Legislature gave the old elected board an opportunity to advise the new appointed board. MCL 380.373(1). The role is purely voluntary, however. 1999 PA 10 imposes no duties whatsoever on the old elected board.

The ACLU brief also attempts to distinguish *Mixon* by arguing that the elected school board in Cleveland had already been stripped of its powers by a federal court order and that, therefore, the legislation that provided for an appointed school board did not alter the status of the elected board. Such an argument is factually incorrect. The elected Cleveland Board

of Education was still in place and, once federal oversight of the school system was removed, the elected board would have reassumed its statutory duties. The legislation that provided for an appointed board ended that possibility. The Ohio legislation at issue in *Mixon* resulted in a change from an elected to an appointed school board, just as 1999 PA 10 does in the present case. The holding of *Mixon* applies in both instances: legislation replacing an elected school board with an appointed board does not implicate § 2 of the VRA.

The ACLU brief and Plaintiffs also argue that the fact that a state official is a member of the appointed Detroit Board somehow distinguishes the present case from *Mixon.* There is nothing in the *Mixon* opinion that even hints that the presence of a state official on the appointed school board would have altered the Court's holding. If § 2 of the VRA is not implemented by a change to an appointed school board, how that board is appointed and who serves on the appointed board is irrelevant.

The amicus brief filed on behalf of Rosa L Parks, the Detroit Chapter of the NAACP and others (the NAACP brief) argues that while § 2 of the Voting rights Act may not apply to historically existing appointive systems, it does apply where there is a change from an elected to an appointed system. There is no support for such an argument in the text of § 2. Section 2 contains no grandfather clause. State legislation either violates § 2 or it does not. In this case 1999 PA 10 does not violate § 2. The same legislation would not violate § 2 if it had been enacted 100 years ago. Section 2 simply has no application to appointive positions, because legislation providing for appointive positions does not involve the "election and nomination" of "representatives."

In sum, arguments by amici below do not present any issue warranting this Court's review and the petition for writ of certiorari should be denied.

**II. The Court below properly held that *Bossier II* is inapplicable to the issues and facts presented in *Mixon* and in the instant matter and does not undermine the holding that Section 2 does not provide a basis for challenging a non-Section 5 jurisdiction's decision to replace an elective system of filling public office with an appointive system.**

Plaintiffs contend that *Mixon* has been undermined by this Court's decision in *Reno v Bossier Parish School Bd.*, 528 US 320, 120 S Ct 866, 145 L Ed 2d 845 (2000) (*Bossier II).* According to plaintiffs, *Bossier II* "holds" that § 2 of the VRA provides broader coverage than § 5 of the Voting Rights Act and, since this Court had previously held that § 5 applied to a statute which changed an elective position to an appointed position (*Allen v State Bd. Of Elections,* 393 US 544, 89 S Ct 817, 22 L Ed2d 1 (1969), § 2 must apply to such a statute as well. *See* Petition for Writ of Certiorari at 12-13, 17.

Plaintiffs' argument is ill founded. *Bossier II* did not hold that § 2 is broader than § 5. And *Bossier II* has no application to the issue present in this case-whether § 2 applies to a statute that results in the replacement of an elected position with an appointed one.

First of all, *Bossier II* involved only § 5 of the Voting Rights Act. As discussed *supra,* Section 5 provides that certain jurisdictions with a history of discriminatory voting practices must obtain preclearance of any statutory change that involves voting qualifications, prerequisites to voting or standards, practices or procedures with respect to voting. 42 USC § 1973c. Preclearance is authorized by the statute if the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* In *Bossier II,* a Louisiana school board sought preclearance of a redistricting plan by filing an action in the United States District Court for the District of Columbia. Preclearance was granted by the District Court. On appeal it was contended by the Attorney General of the United States

and others that preclearance should nevertheless have been denied because, even though the plan did not worsen the situation of minority voters, the plan had a discriminatory purpose. In *Bossier II,* this Court thus defined the issue on appeal in the opening sentence of the majority opinion as follows:

> These cases present the question whether § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. § 1973c, prohibits preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose. [528 US at 322-23]

The Court's holding, stated in the final sentence of the majority opinion, was that preclearance in such a situation was not prohibited. *Id.* at 341.

As the foregoing establishes, the issue before this Court in *Bossier II* was not the relationship between § 2 and § 5 of the VRA. Moreover, in *Bossier II* the Court did not hold that the reach of § 2 was coextensive with or greater than the reach of § 5. The Court had no reason to rule on such matters, and it did not.

Plaintiffs, however, misread the Court's one statement regarding the interplay of § 2 and § 5 as a holding regarding the scope of § 2. In *Bossier II,* the plaintiffs alleged that the redistricting plan illegally diluted the strength of minority voting by failing to adopt a plan that provided for any majority African-American districts. Therefore, the Court treated the case as a vote dilution case and, in that context, stated as follows:

> [A]ppellants object that our reading of § 5 would require the District Court or Attorney General to preclear proposed voting changes with a discriminatory effect or purpose, or even with both. That strikes appellants as an

> inconceivable prospect only because they refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context. It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilative than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.

Plaintiffs rely on the final two clauses of the last quoted sentence as authority for their claim that *Bossier II* holds that § 2 is broader than § 5. It is clear, however, that in *Bossier II* this Court was not making any general statement about the reach of § 2 as compared to the reach of § 5. Rather, the Court was only acknowledging the different purposes of the two VRA sections. Section 5 is an extraordinary burden-shifting mechanism triggered only by a history of voting discrimination and is intended to preemptively prohibit **changes** in election qualifications, standards, practices or procedures that worsen the status quo. Section 2, on the other hand, is the general mechanism for challenging vote dilution that occurs in the election or nomination of office holders, regardless of whether that alleged dilution is the result of a change in election qualifications, standards, practices or procedures or the result of a long-standing practice.

In other words, in *Bossier II* this Court was merely stating the obvious, given its previous decisions: a **vote dilution** case is within the scope of § 2 of the VRA whether or not a regressive statute was involved in the dilution. Contrary to Plaintiffs' arguments, in *Bossier II* this Court did not hold that § 2 was uniformly broader than § 5 of the VRA. Most importantly, the Court did not hold that **any** voting practice, standard or procedure within the purview of § 5 was necessarily within the purview of § 2. Nothing in *Bossier II*, therefore, undermines the holding of *Mixon* or the lower

courts' reliance on that decision to uphold the Michigan statute at issue here.

On the contrary, in the instant matter the Sixth Circuit fully and correctly analyzed the impact of *Bossier II* on the validity of the *Mixon* holding. *Moore v Detroit School Reform Bd,* 293 F 3d 352, 364-365 (6th Cir 2002). Adopting the reasoning laid out above, the Court below recognized the crucial distinction that *Bossier II* dealt only with Section 5 of the VRA and that it did not involve a challenge to an appointive system. *Id.* Quite simply, the Court below recognized that *Bossier II* is not a decision addressing whether § 2 extends to decisions to shift from elective to appointive systems. Moreover, the Court below further distinguished *Bossier II* on the basis that it "did not address the complete denial of the right to vote that the plaintiffs claim is implemented by [1999 PA 10]." *Id.* at 365. On this point, the Court quoted this Court's explanation in *Bossier II* that "our holding today does not extend to violations consisting of an outright 'denial of an individual's right to vote, as opposed to an 'abridgment' as in dilution cases." *Id.* (quoting *Bossier II,* 528 US at 338 n6). Thus, by this Court's express terms, *Bossier II* does not apply to either the *Mixon* case or the instant matter, as both involve claims challenging the complete denial of a right to vote for a public office.

Based on these vital differences between the issues and facts before this Court in *Bossier II* and the issues presented in *Mixon* and this matter, the Court below held that *Bossier II* is not applicable to the instant matter and that *Mixon* remains binding and good precedent in the Sixth Circuit. In sum, the Court held:

> The fact that a plaintiff who brings a vote-dilution claim can succeed under § 2 by demonstrating a discriminatory effect, even though a § 5 action would fail because of the lack of retrogression, is simply not relevant to whether § 2 applies to appointed offices in

> political subdivisions not subject to § 5. [293 F 3d at 365.]

In conclusion, the Court below appropriately considered this Court's decision in *Bossier II* and correctly concluded that it does not undermine the holding in *Mixon* that Section 2 does not provide a basis for challenging the change from an elective to an appointive system in a non-Section 5 jurisdiction. The decision below does not conflict with *Bossier II* and it reflects the unanimous views of the federal courts on this issue. Plaintiffs do not present an issue warranting this Court's review.

## III. Based on the differing language and purposes of Sections 2 and 5, the fact that Section 2 does not provide a basis to challenge a non-Section 5 jurisdiction's decision to replace an elective system with an appointive system is not inconsistent with this Court's holding that similar changes made in a Section 5 jurisdiction are subject to preclearance and review.

Notwithstanding the absence of any support from the language, legislative history, purpose or jurisprudence of Section 2, Plaintiffs persist in complaining that the Court's decision below and in *Mixon* is inconsistent with this Court's holding that a change from an elective to an appointive system falls within § 5 of the Voting Rights Act. *Allen v State Bd. Of Elections, supra.* According to plaintiffs, § 2 and § 5 use identical language and it makes no sense to interpret one provision differently than the other.

Plaintiffs incorrectly assert that the language of Sections 2 and 5 are identical. Both sections refer to a "voting qualification or prerequisite to voting or standard, practice or procedure." With regard to § 5, however, **any** voting qualification, prerequisite, standard, practice or procedure that **differs** from one in effect as of a designated date triggers the preclearance requirement and a VRA challenge. By

comparison, under § 2, a voting qualification, prerequisite, standard, practice or procedure is only within the purview of the section if it denies or abridges the rights to vote **as provided in subsection b of the statute.** Subsection b speaks only of the **nomination and election of representatives.** There is quite simply no language in § 2 that is broad enough to reach a state's decisions as to which public offices should be elected and which should be appointed. And, as the Court noted in *Mixon,* there is no evidence that Congress intended that the language of § 2 be interpreted that broadly.

Section 2, therefore, does not cover everything that might fall within § 5. Furthermore, § 2 is not triggered merely by a change in state law, as implied by Plaintiffs and amici below. A state statute either violates § 2 or it does not, whether that statute is brand new or 100 years old, **but only if** that statute relates to the nomination and election of representatives.

Moreover, contrary to Plaintiffs' assertion, while § 2 and § 5 are complementary, they serve different purposes. Section 5 of the VRA is aimed at those jurisdictions that have a history of voting discrimination. Its purpose was to prevent those jurisdictions from continuously amending their law to avoid the effect of court decisions enforcing the right to vote. *Allen, supra.* Section 5 prescribes a process to review changes in state or local law prior to those changes becoming effective. Section 5 applies even to minor changes in the law and to changes in the law that may not be discriminatory. *Presley v Etowah County Commission,* 502 US 491, 112 S Ct 820, 117 L Ed2d 51 (1992). State laws can be subject to the preclearance procedures of § 5 even though those laws would not violate § 2. Conversely, state laws can pass muster under § 5 even though the laws might violate § 2. *Bossier II, supra.*

On the other hand, a mere change in state law does not automatically implicate § 2 of the Voting Rights Act. Section 2 can be, and often is, applicable to long-standing state statutes. Those statutes must, however, fall within the narrower scope of § 2 as defined by the language of that section.

The fact that Sections 2 and 5 do not have an identical scope of review is entirely consistent with, and necessary to, their different purposes. Most importantly, the differences in the reach of these sections of the VRA is necessary because the preclearance requirements of Section 5 represent an extraordinary encroachment into sovereign powers not justified in a non-Section 5 jurisdiction. It is only because Section 5 jurisdictions have an established history of discriminatory voting practices that the requirement that all changes in voting laws be precleared can be justified. To subject all decisions regarding restructuring public offices from elective to appointive offices to Voting Rights Act review without the predicate of a pernicious history of discriminatory voting practices would be inconsistent with fundamental principles of federalism, separation of powers and state sovereignty. Such restructuring decisions constitute essential governmental functions and reflect important policy determinations regarding what structure and method of governance best serves public interests. The Michigan Legislature's decision to replace elected school boards in qualifying districts reflects the choices of the democratically-elected representatives in this State regarding what is best for the state education system and Michigan's school children. Congress did not intend Section 2 to be used as a tool to encroach upon the power of Michigan's elected representatives to make such fundamental state sovereignty decision.

Plaintiffs' assertion that Section 2 must reach all the types of governmental action reviewed in Section 5 jurisdictions ignores the crucial differences in those two types of jurisdictions. If adopted, Plaintiffs' conception of Section 2's scope would do great violence to state sovereignty and thus was properly rejected by the Court below. The decision by the lower court is in conformity with this Court's VRA jurisprudence, the language and purposes of the VRA, and the other federal courts that have decided this issue. Plaintiffs have not presented an issue warranting review by this Court.

## CONCLUSION

The District Court and the Sixth Circuit Court of Appeals properly upheld the validity of 1999 PA 10. The lower courts correctly held that Section 2 of the VRA does not provide review of a decision to shift from an elective to an appointive system for filling public office in a non-Section 5 jurisdiction. Such a decision is a fundamental power and responsibility of each sovereign state and goes to the core questions of how best to structure public offices to serve vital public interests. The lower court rulings are in conformity with the principles of state sovereignty, federalism, and separation of powers that are the bedrock of our democracy. The Plaintiffs' interpretation of Section 2 of the VRA poses great violence to those foregoing principles and would result in a devastating encroachment on the State of Michigan's self-governance. Respondent Governor John Engler, State of Michigan, respectfully submits that Plaintiffs do not present an issue warranting this Court's review and requests that the Court deny this petition for writ of certiorari.

Respectfully submitted

**JENNIFER M. GRANHOLM**
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Katherine C. Galvin
Assistant Attorneys General
Attorneys for Respondent
Governor

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